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No. 83-1365

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD MASTRANGELO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner waived his objections to admission of the grand jury testimony of a government witness who was murdered before he could testify at trial, where the trial court found by a preponderance of the evidence that petitioner knew of the murder plot against the witness and failed to report it to the authorities.

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OPINIONS BELOW

The opinions of the court of appeals are reported at 722 F.2d 13 (Pet. App. 1a-2a), 693 F.2d 269 (Pet. App. 26a-34a), and 662 F.2d 946 (Pet. App. 41a-60a). The opinions of the district court are reported at 561 F. Supp. 1114 (Pet. App. 5a-25a) and 533 F. Supp. 389 (Pet. App. 35a-40a).

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1983. A petition for rehearing was denied on December 19, 1983. The petition for a writ of certiorari was filed on February 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1981 petitioner was indicted by a federal grand jury in the United States District Court for the Eastern District of New York for conspiring to import marijuana and to possess it with intent to distribute, in violation

of 21 U.S.C. 846; possessing marijuana and methaqualone with intent to distribute, in violation of 21 U.S.C. 841(a)(1); importing marijuana and methaqualone, in violation of 21 U.S.C. 952(a) and 960; and obstructing justice, in violation of 18 U.S.C. 1503. The sole link between petitioner and the drug conspiracy was evidence that petitioner had purchased four trucks that were seized by DEA agents and found to be loaded with drugs.[1] The only witness to the purchase of the trucks was James Bennett, who testified before the grand jury that he had sold the trucks to petitioner under suspicious circumstances. Bennett also identified for the grand jury a tape recording of a conversation he had had with petitioner. During the conversation, petitioner threatened Bennett in order to deter him from identifying petitioner as the purchaser of the trucks.[2]

On the third day of petitioner's joint trial with co-defendant Joseph Dazzo, Bennett was shot dead by two men as he left his daughter's home to go to the courthouse to testify. After petitioner had first moved for a mistrial and then withdrawn his motion (Pet. App. 48a-49a), the trial judge declared a mistrial as to petitioner and subsequently denied his motion to bar reprosecution on double jeopardy grounds. The court stated (Pet. App. 29a):

> It just is inconceivable . . . that this radical step to aid Mastrangelo, who is the only person that could have been helped by killing the witness, would have been

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[1]The seizure of the trucks occurred after federal agents had interrupted the unloading of a 75-foot shrimp boat known as "Terry's Dream," which members of the conspiracy had purchased in Florida in November 1977. In addition to the trucks and shrimp boat, the agents seized a tugboat, three vans and an automobile — which together contained 23.4 tons of marijuana and 499,000 methaqualone tablets (Pet. App. 43a-44a).

[2]The pertinent portion of the tape-recorded conversation is set forth at Pet. App. 28a n.1.

> taken without his knowledge, acquiescence, or orders. And that, it seems to me, is the clearest situation of a finding of manifest necessity that you can get.

The court of appeals affirmed the denial of petitioner's motion to bar reprosecution (Pet. App. 41a-60a), observing that there was a "distinct possibility" that petitioner had participated in Bennett's death (Pet. App. 54a).

2. Prior to petitioner's retrial before a jury,[3] the government moved for the admission of Bennett's grand jury testimony under Fed. R. Evid. 804(b)(5), the exception to the hearsay rule for statements by an unavailable witness where the statements are not admissible under another exception, but have circumstantial guarantees of trustworthiness. Petitioner opposed the motion on the grounds that Rule 804(b)(5) does not permit use of such testimony and that its admission was prohibited by the Confrontation Clause. The district court held the testimony admissible, finding that it had " 'particularized guarantees of trustworthiness' " sufficient to overcome the Confrontation Clause objections (Pet. App. 39a) and noting that in any event "there is a finding by the prior trial judge that the defendant was implicated in the murder of Bennett, a finding characterized by the Second Circuit as 'understandable' " (Pet. App. 38a, quoting Pet. App. 49a). Thereafter, petitioner was convicted on all counts. He was sentenced to a total of nine years' imprisonment, to be followed by a special parole term of ten years, and fined $20,000.

Petitioner appealed. In order to "avoid resolution of the difficult legal and constitutional issues arising under the confrontation clause and Rule 804(b)" (Pet. App. 31a), the court of appeals remanded for an evidentiary hearing to

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[3]The obstruction of justice count against petitioner, which had been severed from the first trial, was rejoined for the second trial.

determine whether petitioner had been involved in Bennett's murder and had thereby waived his objection to use of Bennett's grand jury testimony (Pet. App. 26a-34a). The court stated (Pet. App. 34a) that "[i]f the District Court finds that [petitioner] was in fact involved in the death of Bennett through knowledge, complicity, planning or in any other way, it must hold his objections to the use of Bennett's testimony waived. Bare knowledge of a plot to kill Bennett and a failure to give warning to appropriate authorities is sufficient to constitute a waiver." The court further stated (*ibid.*) that the "standard of proof [on remand] should be a preponderance of the evidence" — although it suggested that the district court make findings under the "clear and convincing" standard as well in order to expedite any further proceedings.

3. After the hearing on remand, the district court held that the government had established "by a preponderance of credible evidence that [petitioner] had prior knowledge of a plot to murder James Bennett and failed to warn the appropriate authorities" (Pet. App. 7a). In particular, the court relied on (1) petitioner's obvious motive to conceal the plot to kill Bennett, (2) petitioner's statement to the murder victim's nephew that Bennett would never take the stand, and (3) petitioner's statement to a cellmate after the murder that the murder "had to be done" (Pet. App. 16a-17a). However, the court determined that the government had not established petitioner's prior knowledge of the murder plot by "clear and convincing" evidence (Pet. App. 17a-18a).

On appeal, petitioner asked the court to reject its previous decision that prior knowledge together with a failure to warn appropriate authorities is sufficient to constitute waiver of the right of confrontation, and that such waiver may be established by a preponderance of the evidence. The court declined this invitation and affirmed the judgment (Pet. App. 1a-2a).

ARGUMENT

Petitioner contends that the courts below erred in holding that he waived his objection under the Confrontation Clause to admission of James Bennett's grand jury testimony. First, he argues (Pet. 12-16) that his prior knowledge of the plot to murder Bennett, coupled with his failure to warn the appropriate authorities, did not amount to a waiver of his right of confrontation. Second, he argues (Pet. 16-30) that the "clear and convincing evidence" standard rather than the "preponderance of the evidence" standard should have been employed in determining whether he waived that right. These claims are without merit.

1. The courts below correctly held that petitioner's failure to notify the authorities about the plot to kill Bennett constituted a waiver of his right of confrontation. It is well settled that the right of confrontation is not absolute and must give way at times to stronger state interests. See *Taylor* v. *United States*, 414 U.S. 17 (1973); *Illinois* v. *Allen*, 397 U.S. 337 (1970). Employing either a concept of implicit waiver or the principle that a person should not profit by his own wrong, courts have repeatedly relaxed the right of confrontation where the defendant wrongfully caused the witness's unavailability. See, *e.g.*, *Reynolds* v. *United States*, 98 U.S. 145 (1878); *Steele* v. *Taylor*, 684 F.2d 1193, 1200-1204 (6th Cir. 1982), cert. denied, No. 82-6109 (Mar. 28, 1983); *United States* v. *Thevis*, 665 F.2d 616, 630-633 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Balano*, 618 F.2d 624, 628-630 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980); *United States* v. *Carlson*, 547 F.2d 1346, 1355-1360 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977). The general theory of these cases is that the "disclosure of relevant information at a public trial is a paramount interest, and any significant interference with that interest, other than by exercising a legal right to object at the trial itself, is a wrongful act." *Steele* v. *Taylor*, 684

F.2d at 1201. While such wrongful conduct obviously includes the use of force and threats, it also has been held to include "persuasion and control by a defendant, *the wrongful nondisclosure of information,* and a defendant's direction to a witness to exercise the Fifth Amendment privilege." *Ibid.* (emphasis added).

Petitioner argues (Pet. 14-15) that his failure to notify the authorities of the murder plot did not constitute a waiver of his confrontation rights because he had no legal duty to make such notification. But this argument misses the point. The basis for the finding of a waiver is not the violation of a legal duty. In *Reynolds* v. *United States, supra,* for example, this Court found a waiver based on the defendant's mere refusal to disclose the witness's whereabouts to a process server. The waiver doctrine rests "on a principle of reciprocity similar to the equitable doctrine of 'clean hands.' " *Steele* v. *Taylor,* 684 F.2d at 1202. Thus, the waiver may be based on wrongful conduct falling short of violation of a legal duty.

This seems an especially clear case. A defendant simply should not be permitted to benefit from the murder of a government witness when he was in a position to prevent the murder by notifying the authorities, but failed to do so. An opposite rule " 'would be contrary to public policy, common sense, and the underlying purpose of the confrontation clause,' * * * and [would] make a mockery of the system of justice that the right was designed to protect." *United States* v. *Thevis,* 665 F.2d at 630 (quoting *United States* v. *Carlson,* 547 F.2d at 1359).[4]

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[4]In each of the cases cited by petitioner (Pet. 13) the court determined that the defendant had waived his right of confrontation. Petitioner cites no decision holding that there can be no waiver absent violation of a legal duty.

2. In arguing that the courts below should have employed the "clear and convincing" evidentiary standard rather than the "preponderance of the evidence" standard in determining whether he waived his right of confrontation, petitioner relies on *United States* v. *Thevis, supra.* To be sure, the court of appeals in *Thevis* stated in dictum[5] that a finding of waiver in this context can be supported only by clear and convincing evidence that the defendant is responsible for the witness's unavailability. *Id.* at 630-631. The court explained that "[w]here reliability of evidence is a primary concern, the Supreme Court has conditioned admissibility on the 'clear and convincing' standard." *Id.* at 631. But the court in *Thevis* obviously misperceived the issue; the question there, as well as here, was not whether the unavailable witness's grand jury testimony was reliable, but whether the defendant, by his conduct, waived his right of confrontation. That question is totally unrelated to issues of reliability. As the court below correctly reasoned (Pet. App. 33a):

> Since the right of confrontation is closely related to the reliability of testimonial evidence, the clear and convincing test may well apply to issues of admissibility arising under it. However, waiver by misconduct is an issue distinct from the underlying right of confrontation and not necessarily governed by the same rules concerning burden of proof * * *.

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[5]In *Thevis*, the district court admitted the challenged evidence on a finding by clear and convincing evidence that the defendant was responsible for the witness's death (665 F.2d at 627). On appeal, the defendant argued that the court should have applied the "reasonable doubt" standard. The court of appeals rejected that argument. The court also rejected the government's argument that a "preponderance of the evidence" standard was sufficient, but that conclusion was plainly unnecessary to decision of the case and is therefore obiter dictum. See *id.* at 630-631.

With respect to the question of waiver, "[a] standard that requires the proponent to show that it is more probable than not that the defendant procured the unavailability of the witness is constitutionally sufficient under the due process and confrontation clauses." *Steele* v. *Taylor*, 684 F.2d at 1202. Accord, *United States* v. *Balano*, 618 F.2d at 629.[6] As the court below correctly concluded (Pet. App. 33a), the more demanding "clear and convincing" evidentiary standard would be inappropriate because

> [s]uch a claim of waiver is not one which is either unusually subject to deception or disfavored by the law. * * * To the contrary, such misconduct is invariably accompanied by tangible evidence such as the disappearance of the defendant, disruption in the courtroom or the murder of a key witness, and there is hardly any reason to apply a burden of proof which might encourage behavior which strikes at the heart of the system of justice itself.

We do not believe that the conflict between the *Thevis* dictum and the decisions of the other courts of appeals that have addressed this issue warrants Supreme Court review. Not only is the majority view, adopted by the Second Circuit below, clearly more persuasive, but we doubt that the

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[6] In resolving the admissibility of extrajudicial statements under the co-conspirator exception to the hearsay rule, the courts of appeals generally apply the "preponderance of the evidence" standard. See, *e.g.*, *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978). And as the court stated in *Steele* v. *Taylor*, 684 F.2d at 1203 (citations deleted), "[s]ince the question of admissibility of * * * statements under the co-conspirator exception is equivalent to a ruling on their admissibility under the confrontation clause, we see no logical reason to impose a higher standard * * * in connection with rulings on the admissibility of similar extra-judicial statements [under a waiver theory]."

difference in the standards would affect the ultimate outcome of the waiver question in many cases.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

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[7]This case is highly unusual on its facts, as petitioner's extended discussion of those facts demonstrates (Pet. 5-11, 19-29). The district court's determination that petitioner's knowledge of the murder was established under one standard, but not the other, may well prove to be unique.